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REPAIRS TO BUSINESS PREMISES — WHEN ARE THEY DEDUCTIBLE?

by

J. H. GREENWELL
Barrister-at-Law

Section 53 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1957 provides that "Expenditure incurred by the taxpayer in the year of income for repairs, not being expenditure of a capital nature, to any premises or part of premises, plant, machinery, implements, utensils, rolling stock or articles held, occupied or used by him for the purpose of producing assessable income or in carrying on a business for that purpose shall be an allowable deduction". Two recent cases before the Board of Review illustrate when an expense comes within the section.

In 4 C.T.B.R. (N.S.) *Case* 122 the problem concerned the replacement of a wooden with a concrete floor. The wooden floor of the taxpayer's business had deteriorated greatly over 40 years. Eventually a large section of the floor was replaced by a concrete surface. This was apparently cheaper than laying a new wooden floor. The concrete surface was then covered with Ormonoid floor covering. The taxpayer claimed that the cost of replacing the concrete floor was deductible and the Board in a majority decision upheld the claim.

In 1935 FINLAY, J. considered the distinction between a repair and a replacement (*Margrett* v. *Lowestoft Water & Gas Coy.* (1935), 19 T.C. 481). "Every repair is a replacement. 'Repair' and 'renew' are not words expressive of a clear contrast. Repair always involves renewal—a renewal of a subordinate part. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinct from repair, is reconstruction of the entirety not necessarily the whole but substantially the whole matter under discussion."

The application of this useful principle is not always easy—involving, as it does, a question of degree. Nor is it easy to determine whether there has been expenditure of a capital nature. It is clear that the mere fact a different material is substituted in the replacement is not conclusive (*Rhodesia Railways Ltd.* v. *Income Tax Collector, Bechuanaland,* [1933] A.C. 368). It is, however, extremely relevant if the replacement results in an improvement and possesses advantages over the old structure. Thus in *Federal Commissioner of Taxation* v. *Western Suburbs Cinemas Ltd.* (1952), 86 C.L.R. 102, KITTO, J. said of a replaced ceiling: "It did much more than meet a need for restoration; it provided a ceiling having considerable

advantages over the old one, including the advantage that it reduced the likelihood of repair bills in the future" (p. 106).

The Board was influenced by these principles in upholding the taxpayer's claim. In the first place it was not the replacement of an entirety but merely the defective surface. The fact that it was a cheaper material than if the wooden floor had been relaid was also emphasized. Further, although the cost of repairing in the future may be reduced, this was offset by the necessity of covering parts of the new surface. This was not required with the original wooden floor.

This decision may be contrasted with 7 C.T.B.R. (N.S.) *Case* 133, where the taxpayer had agreed with the owner of an adjacent shop to restore and modernize the shop front. In the course of the work it became necessary to demolish and reconstruct the party wall between the two shops and the wooden floor on one of the floors was removed and replaced with new materials. The taxpayer sought a deduction for the expense incurred in replacing the wooden flooring. The claim was rejected. It merely formed part of a greater expenditure which aimed at and succeeded in effecting a substantial improvement to the taxpayer's premises.

THE LAWS OF CYPRUS

by

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General

Cyprus is a British colony in the Eastern Mediterranean administered by a Governor with the aid of his Executive Council, the Members of which are all Government officials nominated by the Governor. The present Governor is Sir Hugh Foot, the Deputy Governor is Mr. George Sinclair, whilst the Administrative Secretary is Mr. John Reddaway.

Legislation

(a) There is no elected legislative body. All legislation is enacted by the Governor and becomes law immediately on its publication in the official Cyprus *Gazette*. The present Chief Justice is Sir Paget Bourke and the Attorney-General is Sir James Henry.

(b) All Members of the English, Scottish and Irish Bar and solicitors can practise in all the courts in Cyprus by being enrolled as Advocates of the Supreme Court of Cyprus. There are no solicitors in Cyprus and, consequently, barristers do the work of solicitors in addition to their duties at the Bar; whilst solicitors can appear as counsel in the courts in addition to performing their normal duties as solicitors.

(c) There are five main classes of courts: (1) Magistrate's Courts, (2) District Judge's Courts, (3) The Courts of the President of the District Courts, (4) Full District Courts, consisting of the President of the District Courts and one District Judge; and (5) the Supreme Courts. All these courts exercise civil and criminal jurisdiction. The Supreme Court is mainly an Appellate Court and hears appeals from the courts below. The Supreme Court, however, has original jurisdiction in such limited matters as divorce, companies law and contempt of court proceedings. An appeal from a single judge of the Supreme Court is heard before two judges of the Supreme Court. Appeals from the decisions of the Appellate Division of the Supreme Court lie to the Privy Council.

(d) There is no jury system in Cyprus. All criminal cases of major importance are heard by the Assize Court, which consists of one of the Supreme Court judges, a president of the District Court and a district judge; or it may consist of one of the Supreme Court judges and two district judges. Before a criminal case is laid before the Assize Court, there is a Preliminary Enquiry before a

magistrate. At the Preliminary Enquiry the accused can be represented by counsel. An appeal from a judgment of the Assize Court is heard before two judges of the Supreme Court. The Supreme Court sits only at Nicosia, the capital of Cyprus; whilst the Assize Courts hold their sittings three times a year in the six principal towns in the colony.

(e) Owing to terrorist activities in Cyprus, a great deal of Emergency Regulations have been enacted. The only cases tried under the Emergency Regulations are criminal cases of a political or terrorist nature. All such cases are tried by what is locally known as "Special Courts". The Preliminary Enquiry before a magistrate can, under certain circumstances, be dispensed with. There is again no jury system. The judges of the Special Courts are distinguished members of the English, Scottish or Irish Bar, most of whom have had considerable experience and service in other colonial territories where terrorist activities have at one time prevailed. The ordinary rules of evidence apply in the Special Courts where counsel are allowed to appear. All proceedings are also open to the public and press. Appeals from the judgments of the Special Courts lie to the Supreme Court. There is a further appeal from the decision of the Supreme Court to Her Majesty's Privy Council in London.

Powers of Attorney

There are no Justices of the Peace or Commissioners of Oaths or Notaries Public in Cyprus. All documents, therefore, have to be attested before one of the magistrates, judges or one of the registrars of the courts in Cyprus. A power of attorney can be executed for any lawful purpose, but it is advisable to always bear in mind that a power of attorney executed in a country outside Cyprus will not be legally effective in Cyprus unless it has been executed in accordance with the laws of Cyprus. A power of attorney, known locally as a form of retainer, has to be filed in all civil actions in Cyprus but a form of retainer is not necessary where the plaintiff or the defendant resides outside Cyprus. A power of attorney is, however, essential for all other purposes. All powers of attorney must be stamped and declared within the stipulated period before a court registrar.

Affidavits

Affidavits for use in the courts in Cyprus will be admissible if drawn up in accordance with the laws of most of the British Dominions and Colonies, are in the English language, are set out in numbered paragraphs and bear the signature and seal of the court or official before whom they are made and are duly stamped.

Companies

The law relating to the formation and registration of limited liability companies is in many respects similar to the law prevalent in England. The Memorandum of Association and the Articles of Association of all public and private companies must be printed. It is, of course, essential to have them printed after the approval of the Registrar of Companies, Cyprus, has first been obtained as to the contents of the Memorandum and Articles of Association. Typed or cyclostyled copies are not permissible. Every company of every nature, kind or description incorporated outside Cyprus which carries on business within Cyprus must file with the Registrar of Companies in Cyprus certain documents, such as a certified copy of its Charter, Statutes or Memorandum and Articles of Association and a list of the directors of the company; and it must also notify to the Registrar of Companies, Cyprus, the name and address of some person resident in Cyprus authorized to accept on behalf of the company service of process and any notices required to be served on the company. Every such company also has to file certain annual returns with the Registrar of Companies in Cyprus.

Patents and Trade Marks

The laws relating to patents and trade marks in Cyprus are also based on similar legislations in England. The stampages and other charges for registering a trade mark in Cyprus are in the neighbourhood of £10. The Cyprus pound is equivalent in value to the English pound sterling.

Foreign Judgments

The enforcing of foreign judgments is governed by the Statutory Law of Cyprus and the rules made thereunder. Judgment means a judgment or order made by a court in any civil proceedings whereby any sum of money is made payable or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to any injured party and includes an award in proceedings on an arbitration if the award has, in pursuance of the law enforced in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

All foreign judgments must be registered in one of the District Courts of Cyprus where the defendant resides or carries on his business. The registration of such foreign judgments can be set aside if the courts in Cyprus are satisfied that the foreign judgment was obtained by fraud or that the enforcement of the foreign judgment would

be contrary to public policy or that a court of the country of the original court had no jurisdiction to determine the case.

The courts in Cyprus, when registering a foreign judgment, also register the costs which have been taxed and allowed in the original judgment. The documents required in Cyprus for enforcing foreign judgments are a certified and sealed copy of the foreign judgment to be registered together with the affidavit of the judgment creditor.

LIABILITY FOR DAMAGE CAUSED BY ANIMALS*

The case of *Behrens* v. *Bertram Mills Circus, Limited*, [1957] 1 All E.R. 583, has raised again the question of the law of civil liability for damage done by animals, which was the subject of an inquiry by a committee under the chairmanship of LORD GODDARD, C.J. This committee issued a report dated 24th November, 1952 (Cmd. 8746), making certain recommendations which have not yet received the consideration of Parliament.

As is well known, the law regards animals as falling into one of two classes, the first being those animals which by nature are wild and untamed, known as *ferae naturae*, and the second animals which are of a tame or domestic nature, which are termed animals *mansuetae naturae*.

Animals of an obviously wild nature, like lions, tigers, leopards, crocodiles, clearly fall into the first class, but judicial decision has placed other animals of a milder and more tame disposition in this class, such as a monkey (*May* v. *Burdett* (1846), 7 L.T. Rep. (O.S.) 253; 9 Q.B. 101) and a tame elephant (*Filburn* v. *People's Palace and Aquarium Company, Limited* (1890), 25 Q.B.D. 258).

Animals *mansuetae naturae* have been defined as those which by habit or training live in association with man; and in *McQuaker* v. *Goddard*, 162 L.T. Rep. 232; [1940] 1 All E.R. 471, where evidence was given that in no part of the world did camels exist as wild animals but only under the control and service of man, the Court of Appeal held that camels came within that category and that the owners of a zoo were not liable to a person who had been bitten by

* By courtesy of *The Law Times*, England.

a camel. A bull might commonly be regarded as a somewhat uncertain animal from the point of view of safety but, as it obviously comes within the above definition like other cattle, it is regarded in law as an animal *mansuetae naturae*.

A person who keeps an animal of the *ferae naturae* class does so at his peril. In *May* v. *Burdett* (*supra*), where a monkey bit the plaintiff, LORD DENMAN, C.J., said: "Whoever keeps an animal accustomed to attack and bite mankind with knowledge that it is so accustomed is prima facie liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities." In the case of animals of this class such knowledge will be assumed.

Whether this is an absolute liability and applies even when the animal's act or escape is due to an act of God or the intervention of a third person has never been finally settled, but such a cause has been held to be a defence to other types of claim based upon the *Rylands* v. *Fletcher* (1868), 19 L.T. Rep. 220; L.R. 3 H.L. 330, rule of strict liability. Thus, in *Nichols* v. *Marsland* (1876), 35 L.T. Rep. 725; 2 Ex. D. 1, where the defendant had stored a quantity of water to form artificial lakes which burst as a result of an extraordinary storm and caused damage, it was held that, as the lakes had been carefully constructed and maintained and the downpour of rain was so extraordinary as to amount to *vis major*, the defendant was not responsible. BRAMWELL, B., in drawing a distinction between the storage of water and the keeping of a wild animal, said: "I am by no means sure that if a man kept a tiger and lightning broke his chain and he got loose and did mischief that the man who kept him would not be liable." No such case has ever been decided, but in *Marlor* v. *Ball* (1900), 16 T.L.R. 239, where a man got injured through stroking a zebra which was securely tied up in a stable, the owner of the zebra was absolved from responsibility.

The question was discussed by the Court of Appeal in *Baker* v. *Snell*, 99 L.T. Rep. 753; [1908] 2 K.B. 825, where the defendant's servant incited a dog which was known to be savage to attack the plaintiff. The Court of Appeal upheld the decision of the Divisional Court, which had ordered a new trial on the application of the plaintiff, who had been non-suited in the court below. All three members of the court held that the question whether the servant was acting within the scope of his employment should have

been left to the jury, but SIR HERBERT COZENS-HARDY, M.R., and FARWELL, L.J., also held that a person keeping an animal *ferae naturae* or one *mansuetae* which is known to be savage is answerable for any harm done by the animal, even though the immediate cause of the injury is the intervening voluntary act of a third person. *May* v. *Burdett* and the distinction drawn in *Nichols* v. *Marsland* were quoted in support of this view, which was dissented from by KENNEDY, L.J. He agreed that in such an action there is no obligation to prove negligence, but said that the use of the term "prima facie" by LORD DENMAN in *May* v. *Burdett* suggested that there might be an answer to the action, such as the intervention of a third party. If the liability for damage caused by a savage animal is based upon the *Rylands* v. *Fletcher* rule, the decision of the Judicial Committee of the Privy Council in *Richards* v. *Lothian*, 108 L.T. Rep. 225; [1913] A.C. 263, that the unauthorized act of a third person is a defence to that type of action may throw some doubt on the view suggested by BRAMWELL, B., in *Nichols* v. *Marsland* because, if the intervention of a third person is a defence, that of *vis major* must be a defence likewise.

There is much to be said, however, both legally and morally for the view that anyone who chooses to keep a savage animal should accept liability for all its acts, particularly when these are in keeping with its nature.

In *Behrens* v. *Bertram Mills Circus, Limited* an attempt was made to exclude this absolute liability where the animal in question was highly trained and in fact tame, and where the injury suffered was not caused by an attack of the animal or its vicious propensity. In this case the plaintiffs were midgets who rented a booth in a hall also occupied by the defendants, who were circus proprietors. In the circus were a number of highly trained Burmese elephants, which were in fact as tame and as harmless as many an animal of the *mansuetae naturae* class. These elephants had from time to time to pass the plaintiffs' booth when going into the circus ring, and on one occasion they became frightened or disturbed by the barking of a dog with the result that one of the elephants ran into and knocked down the plaintiffs' booth, causing it to fall on the female plaintiff, whereby she sustained serious injuries. There was no question of the elephant making any attack on the plaintiff.

DEVLIN, J. held (following *Filburn* v. *People's Palace*, *supra*) (1) that as a matter of law all elephants are dangerous and that it made no difference that the particular elephant in question was highly trained, and in fact tame, for the harmfulness of an offending animal was to be

judged not by reference to its particular training and habits but by reference to the general habits of the species to which it belonged; and (2) that the keeper of a dangerous animal was under an absolute liability to confine it or control it so that it should do no harm, and liability applied whether or not the injury resulted from the animal's vicious or savage propensity.

The owners of animals *mansuetae naturae* are under no such absolute liability as applies to animals of the other class. The cause of action of a person injured by such an animal must be founded either on trespass or in negligence. Negligence is a question of fact and there are certain circumstances where the courts have held that a breach of a duty to take care of such an animal by its owner renders him liable in damages for an injury which is a direct consequence of that breach of duty.

These cases of negligence will be considered separately later, but it will be found that, in all cases where negligence is established, the owner will only be liable if the act of the animal is one which is a natural one in the circumstances; if the injury is caused by an act out of keeping with the nature of the animal, the damage will be considered as too remote and the owner will only be liable on proof that he was aware of a tendency in the animal to do the injury in question. This knowledge is called *scienter*.

Apart from negligence, the owner of a domestic or tame animal will only be liable for damage caused by the trespass of the animal where such damage is the ordinary consequence of the trespass.

It must be remembered that this liability is based on the old common law rule of cattle trespass and that, as the right of action for trespass is a right of occupation, the only person who can successfully maintain an action for damage done by an animal's trespass is the occupier of the land upon which the trespass is committed. Moreover this action will only lie in the case of an animal to which the cattle trespass rule applied (it did not, for example, apply to domestic animals such as dogs and cats).

Until the decision in *Lee* v. *Riley* (1865), 12 L.T. Rep. 388, damages for cattle trespass were confined to physical injury to the land or the crops growing thereon, and such damage would of course be the natural and direct result of such trespass. In that case, however, the plaintiff recovered damages for the death of his horse, which was kicked by the plaintiff's mare which trespassed on his land. There was no evidence that the mare was vicious and the court held that the damage was not too remote. This case was followed in *Ellis* v. *Loftus Iron Company* (1874),

31 L.T. Rep. 483, L.R. 10 C.P. 10, where the trespassing animal was a stallion which kicked the plaintiff's mare while she was on the plaintiff's land.

There does not appear to be any reported case of a claim for damages for personal injuries caused by cattle trespass until *Wormald* v. *Cole*, [1954] 1 All E.R. 683, where the defendant's cattle, which were of a quiet and well-behaved disposition, without negligence on his part escaped from his land into the grounds of the plaintiff's house. While the plaintiff and her servant were trying in the dark to prevent them getting into her garden, one of them knocked her down and injured her. There was no evidence that the beast that injured the plaintiff made any attack upon her, and the accident was found to be due to the clumsiness or panic of the animal rather than any vicious propensity.

Counsel for the plaintiff admitted that, had the plaintiff's injuries been caused by an attack or by vicious propensity in the animal, in the absence of *scienter* he could not succeed, but LORD GODDARD, C.J., said that it must not be assumed that he necessarily agreed with this contention, and later in his judgment said: "I leave open the question whether it follows that, if a trespassing animal attacks the occupier, he can recover, though I incline to the opinion that he can. I do not think that the question has ever yet arisen in a cattle trespass case, and it does not arise here. In many cases it would be impossible to say with certainty whether the injuries were caused by vice, or playfulness, or mere accident." His lordship expressed the opinion that the cases of *Lee* v. *Riley* and *Ellis* v. *Loftus Iron Company* do not appear to proceed on what is, or is not, the natural disposition of horses but merely on the fact that the trespassing horse did damage.

The question at issue in *Wormald* v. *Cole* was whether an occupier of land who suffers personal injuries from trespassing cattle acting according to their natural propensity can recover damages and the Court of Appeal held, applying *Lee* v. *Riley* and *Ellis* v. *Loftus Iron Company* and dicta of KENNEDY, L.J., in *Bradley* v. *Wallaces, Limited*, 109 L.T. Rep. 281; [1913] 3 K.B. 629, and ATKIN, L.J., in *Buckle* v. *Holmes*, 134 L.T. Rep. 743; [1926] 2 K.B. 125, that such damage was not too remote.

The question whether an occupier of land can recover damages for injury caused by a vicious attack by a trespassing animal is left open in *Wormald* v. *Cole*. The judgments of the three members of the court contain quotations from various judgments in previous cases, some supporting one view and some the other; but the test appears to be whether the damage is the direct result of the trespass.

HODSON, L.J., suggests that the distinction between vicious and non-vicious acts can be eliminated in cases of cattle trespass.

The distinction exists in cases where the action is founded on negligence, as is illustrated by *Lathall* v. *A. Joyce and Son*, [1939] 3 All E.R. 854, where the defendants, who were driving a bullock from a lorry into a passage leading into a yard from the street, failed to provide adequate gates and the animal escaped. When some distance away from the place of escape, the bullock charged the plaintiff, who was riding his bicycle. OLIVER, J. held that the defendants had been negligent in delivering a restive bullock in a busy street without taking certain precautions to prevent its escape, but because there was no evidence of *scienter* the defendants could only be responsible in law for the results which naturally flowed from their breach of duty, and that, as the plaintiff's injuries were sustained by a direct attack of the bullock and not merely by a collision with it, he could not recover damages.

Whoever studies the law of tort relating to actions for damage to property or for personal injuries will soon discover an exception to the general rule of law if the damage has been sustained on or near the highway. This exception applies in the case of animals because the cattle trespass rule never applied where wandering cattle caused damage on the highway. The reason for this is purely historical. In *Heath's Garage, Limited* v. *Hodges*, 115 L.T. Rep. 129; [1916] 2 K.B. 370, the Court of Appeal held that a motorist could not recover for damage to his car caused by the defendant's sheep wandering on the highway. NEVILLE, J. said that the experience of centuries had shown that the presence of domestic animals upon the highway was not inconsistent with the reasonable safety of the public using the road and that there was an absence of any authority which imposed any liability for cattle trespassing on the highway.

A person injured in such circumstances must frame his action in negligence but he will find difficulty here because it is firmly established that the owner of land adjoining the highway is under no liability to fence his animals from the highway. Two decisions of the Court of Appeal, *Hughes* v. *Williams*, 168 L.T. Rep. 305; [1943] 1 All E.R. 535, and *Brock* v. *Richards*, [1951] 1 All E.R. 261, and that of the House of Lords in *Searle* v. *Wallbank*, 176 L.T. Rep. 104; [1947] 1 All E.R. 20, confirm this principle. In *Brock* v. *Richards* it was held that the fact that the animal causing the damage had a special proclivity to stray or the existence of special circumstances affecting the

nature of the *locus in quo*, which, for example, caused the animal when straying to go over or through a hedge or down a bank, did not impose any duty on the defendant.

If the owner of the animal knows it to be savage he will of course be under a duty to prevent it doing mischief. SIR RAYMOND EVERSHED, M.R., in *Brock* v. *Richards* did suggest that an animal, though not savage, might be dangerous because of its frolicsome behaviour, and that such an animal must be taken to have propensities against which (if he knows of them) the owner has a duty to guard. There are always cases where the particular facts impose a duty to take care. Examples are *Deen* v. *Davies*, 153 L.T. Rep. 90; [1935] 2 K.B. 370, where the defendant brought a pony into the streets of Merthyr Tydfil, a town of 80,000 inhabitants, and tied it up so negligently that it escaped from a stable on to the highway, where it injured the plaintiff, and *Aldham* v. *United Dairies (London) Limited*, 162 L.T. Rep. 71; [1939] 4 All E.R. 522, where the defendant left a horse and cart unattended for half an hour in a busy thoroughfare. Evidence was given that the horse had a habit, when left alone for some time, of straying on to the pavement. The Court of Appeal upheld the decision of HUMPHREYS, J. that there was evidence of negligence to go to the jury.

The question of liability for damage caused on land by an animal trespassing from the highway is one upon which there is some conflict of opinion.

The law is really governed by the decision of MCCARDIE, J. in *Gayler and Pope, Limited* v. *Davies and Son, Limited*, 131 L.T. Rep. 507; [1924] 2 K.B. 75, who followed the decisions in *Goodwyn* v. *Cheveley* (1859), 4 H. & N. 531, and *Tillett* v. *Ward* (1882), 47 L.T. Rep. 546; 10 Q.B.D. 17. In both these two last-mentioned cases the owners of animals which escaped from the highway on to private property, in the first case through a gap in a fence and in the second through the open door of a shop, were held not liable for damage caused by the animals. In *Gayler and Pope's* case a runaway horse and van broke through the window of the plaintiff's shop but MCCARDIE, J. held that this distinction was immaterial.

The foundation of this exception from the general rule of liability for trespass by animals is the doctrine of *volenti non fit injuria*. The occupier of premises adjoining the highway takes the risk of injury caused by traffic lawfully on the highway. *Pollock on Torts* says: "This rule [the cattle trespass rule] does not apply to damage done by cattle straying off a highway on which they are being lawfully driven; in such a case the owner is only liable on proof of negligence and the law is the same for a town street as for a country road."

The exception was stated more widely by LORD BLACKBURN in *River Wear Commissioners* v. *Adamson* (1877), 37 L.T. Rep. 543; 2 App. Cas. 743, thus: "Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining a harbour or navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss unless he can establish that some other person is at fault."

There is a conflict of legal opinion as to whether this exception to the general rule of liability for trespass should not be confined to cases where the property is not fenced off from the highway. If the foundation of the exception is the principle *volenti non fit injuria*, it is argued that it should not apply where the owner of the land has taken reasonable precautions to prevent animals straying from the highway.

This conflict of opinion is illustrated by two conflicting county court decisions, *Timothy Whites, Limited* v. *Byng* (1934), 1 L.J. N.C.C.R. 47, and *Goldston* v. *Bradshaw* (1934), 1 L.J. N.C.C.R. 335. In each of these cases, as in *Gayler and Pope* v. *Davies*, the trespassing animal from the highway broke through a shop window. In the first case JUDGE BARNARD LAILEY held, following the principle stated by WILLIAMS, J. in *Cox* v. *Birbidge* (1863), 13 C.B.N.S. 438, as to the absolute liability for damage caused by trespassing animals, that the plaintiff's action for damage to the shop succeeded on the ground of trespass. He refused to follow the judgment of MCCARDIE, J. as being inconsistent with cases of long standing. But in the second case JUDGE RICHARDSON rejected this view and held, following *Gayler and Pope* v. *Davies*, that the shopkeeper's claim failed in the absence of negligence. Support for this view is to be found in the fact that in the subsequent decisions of the Court of Appeal in *Deen* v. *Davies* (*supra*), and *Aldham* v. *United Dairies* (*supra*), and that of OLIVER, J. in *Lathall* v. *Joyce* (*supra*), the issue of trespass does not appear to have been raised.

It would appear, although there is no reported decision of the High Court on the point, that the exception will only apply in the case of animals which are part of the traffic of the highway. If the cattle in *Wormald* v. *Cole*, after escaping from the defendant's land, had wandered down the lane adjoining the plaintiff's grounds before entering them, the defendant would presumably still have been liable. A county court decision to this effect is *Morris* v. *Curtis* (1947), 14 L.J. N.C.C.R. 284.

No treatise on the law relating to animals can be complete without some reference to those animals beloved of the law, the domestic dog and the domestic cat. For some reason the cattle trespass rule never applied to these animals, and in *Buckle* v. *Holmes* (*supra*), where the defendant's cat strayed on to the plaintiff's land and killed some pigeons, the Court of Appeal held that the owners of these animals are never liable for damage done by them in trespassing where the damage is the natural propensity of their species; where the damage is not so, it will presumably be too remote.

The committee previously referred to recommended (1) that the distinction between animals *ferae naturae* and animals *mansuetae naturae* should be abolished and that liability for the acts of every class of animal should be based upon negligence and the doctrine of *scienter* should be abolished; (2) that an occupier of land should be under a duty to take reasonable care that his cattle and poultry do not escape on to the highway and should be responsible for all damage caused to persons or property by a breach of such duty whether or not the damage done by the animal is in accordance with its ordinary nature.

It also recommended that the cattle trespass rule be retained but that the damage recoverable should be limited to the damage done to the land and crops. If these recommendations had been given legal effect, the plaintiffs in *Wormald* v. *Cole* and *Behrens* v. *Bertram Mills Circus* would not have recovered damages. A minority report by Professor Goodhart expressed dissent with the recommendation that the strict liability of the owner of an animal *ferae naturae* should be abolished. The abolition of the rule would make the question raised by BRAMWELL, B., no longer one of practical importance.

CASE NOTES

Commission Agent

Real estate agent — commission — finance offered on terms unacceptable to purchaser — property sold by another agent —whether first agent entitled to commission.—D. retained P. to find a buyer for property for £7,500, of which £3,000 was required in cash. P. introduced G., who could pay only £2,500 in cash and declined to accept arrangements by P. as to raising the additional £500 required. G. then purchased the property through another agent, who was able to raise the £3,000 on terms acceptable to G. P. sued D. for commission and obtained judgment. On appeal it was held that P. was not entitled to commission because he had failed to fulfil his obligation under the terms of his retainer and the appeal was allowed (*Pratt* v. *Gee* (1958), 76 W.N. (N.S.W.) 57).

Companies

Alteration of articles — shareholders being trustees in unit trust — validity of resolution altering voting provisions — Companies Act 1936, s. 20.—The defendant company gave notice of an extraordinary general meeting at which it was proposed to pass a special resolution affecting the voting powers of any member of the company holding ordinary shares of the company as trustees for holders of units or sub-units or stock or shares in any public unit or flexible trust or public investment trust or any trust to which the public are invited to or may subscribe as beneficiaries. The plaintiff companies held a number of shares in the defendant company as trustees in connexion with a number of schemes of investment known as unit or flexible trusts and brought a suit to restrain the defendants from changing the articles as proposed or from acting on any such new article. It was held that the effect of the article was to discriminate between and to give the majority of the shareholders an advantage over the minority and that there were no grounds on which reasonable men could decide that the article confined in its terms to the plaintiff shareholders was for the benefit of the company as a whole and that the plaintiffs were entitled to the relief sought (*Greenhalgh* v. *Arderne Cinemas Ltd.*, [1951] 1 Ch. 286, at p. 291, per EVERSHED, M.R., applied) (*Australian Fixed Trusts Pty. Ltd.* v. *Clyde Industries Ltd.* and *Union Insurance Society of Canton Ltd.* v. *Clyde Industries Ltd.* (1958), 76 W.N. (N.S.W.) 88).

Contract for Grant of Lease

Offer and acceptance — oral agreement — deposit paid — lease to be prepared by lessor's solicitors — no final agreement reached — oral agreement unenforceable.—Z. and W.

discussed the grant of a lease by W. to Z. of a shop, certain terms were agreed upon and a deposit paid. The receipt for the deposit contained the words "On terms as agreed upon, lease to be prepared by the company's solicitors". The draft lease included provisions never discussed nor agreed between the parties. On submission of the draft lease, the solicitors for Z. wrote stating that Z. was not prepared to proceed with the transaction, and asked for a return of the deposit. Z. sued W. to recover the deposit, but a verdict was given for W. On appeal it was held that the parties had never reached final agreement in the terms submitted in the draft lease, and that no enforceable contract existed when Z. withdrew from negotiations, and the appeal was allowed (*Masters* v. *Cameron* (1954), 91 C.L.R. 353 applied) (*Zimin* v. *Wentworth Properties Pty. Ltd.* (1958), 76 W.N. (N.S.W.) 54).

Landlord and Tenant

Prescribed premises — availability of reasonably suitable alternative accommodation — order for recovery of possession — whether accommodation required to continue to be available after making of the order — Landlord and Tenant (Amendment) Act 1948-1957, s. 70(2).—A magistrate made an order for the recovery of possession of a dwelling-house by the lessor, after finding that reasonably suitable alternative accommodation for the lessee had been provided by the lessor. An application for rescission was lodged by the lessee who claimed that the accommodation was required to continue available for a reasonable time after the order had been made and that this requirement had not been complied with. The magistrate refused to rescind the order, and, on appeal from this decision by way of case stated, it was held that the requirement of s. 70(2) of the *Landlord and Tenant (Amendment) Act* 1948-1957 that the lessor should have such accommodation immediately available for the lessee was no more than a condition precedent to the making of the order, and that a requirement that the accommodation should continue to be available for some subsequent period after the making of the order could not be read into the provision (*Alexander* v. *Jaeger* (1958), 75 W.N. (N.S.W.) 496).

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